Tresenergy Sdn Bhd v Mohd Fauzi bin Ya'akob & Anor

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-603–12 OF 2018
GUNALAN J
7 APRIL 2019

Contract — Agreement — Breach — Third party appointed plaintiff as main contractor for the project of leased Floating Production, Storage and Offloading ('project') — Plaintiff and defendants entered into consortium agreement for purpose of executing project — Second defendant executed performance guarantee for benefits of plaintiff — First defendant was appointed as project manager — Third party terminated the contract — Plaintiff sued defendants for breach of contract, tort of inducement of breach of contract and breach of fiduciary duty — Second defendant filed counterclaim premised on allegation that plaintiff had caused enforcement of performance guarantee against second defendant — Whether there was fiduciary relationship — Whether breach of fiduciary duties and duties under consortium agreement led to termination of contract by third party — Whether consortium agreement binding upon defendants — Whether causes of action of breach of contract, tort of inducement of breach of contract and breach of fiduciary duty were proven against defendants — Whether plaintiff's liability to second defendant under performance guarantee was established

Vide a letter of award ('the letter of award'), the plaintiff was appointed by Ophir Production Sdn Bhd ('OPSB') as the main contractor for the project of leased Floating Production, Storage and Offloading ('FPSO project'). As the main contractor, the plaintiff was responsible to purchase a vessel and subsequently to fabricate the vessel into FPSO vessel to be used at the Ophir Field Zone. For the purpose of executing the said project, the plaintiff and the second defendant had entered into a joint venture vide a consortium agreement ('consortium agreement'). The second defendant had also executed a performance guarantee for the benefits of the plaintiff and OPSB in that, in the event the contract between OPSB and the plaintiff was terminated by the former; the second defendant would take over the contract ('performance guarantee'). The first defendant in the present case was appointed as the project manager to supervise and manage the said FPSO project. Throughout the commencement of the said FPSO project, there were several delays when the plaintiff had still yet to secure the approval of facility from SME Bank. The delay had caused the plaintiff to be running out of capital to obtain towing service to tow the said vessel to OPL Johor. Subsequently, due to the delay in the towing process of the vessel, OPSB terminated the plaintiff's service as the main contractor of the said FPSO project ('the said termination'). OPSB then enforced the performance guarantee which caused the second defendant to

take over and complete the FPSO project. Due to the plaintiff's failure, the second defendant had suffered difficulties and had also to bear huge expenses to run the FPSO project. The plaintiff in the present case sued defendants for breach of contract, breach of fiduciary duties and tort of inducement of breach of contract whereas the second defendant filed a counterclaim for damages for breach of contract by the plaintiff that allegedly caused the enforcement of the performance guarantee against the second defendant.

Held, dismissing the plaintiff's claim with costs and allowing the second defendant's counterclaim with costs of RM30,000:

(1) The defendants correctly highlighted the following factors that would go to dispel any notion of a fiduciary relationship between the plaintiff and the first defendant: (a) the first defendant as the project manager, reported to the Steering Committee which comprised of representatives from both plaintiff and the second defendant; (b) the first defendant could not do anything without the approval of the Steering Committee; and (c) there was no evidence led by the plaintiff that they were vulnerable and/or at the mercy of the first defendant. Even assuming there was such relationship between the plaintiff and the first defendant, it was not proved that the purported breach of fiduciary duties by him had caused OPSB to terminate the letter of award nor was any notice of the same issued to him at the material time (see paras 14 & 29).

(2) Based on the overall evidence, it was indisputable that the contract was terminated by OPSB solely due to the failure of the plaintiff to perform its contractual terms and obligations, particularly regarding its failure to obtain the necessary funding or loan facilities for the FPSO project. It was not due to any breaches of fiduciary or other contractual duties by the defendants. Following the termination, no notice or correspondence was issued to the defendants notifying them that their purported acts or omissions had contributed to the termination of the FPSO contract by OPSB that would have provided the defendants an opportunity to explain the situation (see para 25).

(3) The consortium agreement between the plaintiff and the defendants had ceased to exist and was no longer binding on the defendants as evidenced by the former's own letter dated 22 March 2017. The defendants therefore were in law discharged from their original contractual obligations under the consortium agreement. Based on all the above reasons, the plaintiff had therefore failed to prove on a balance of probabilities its cause of action and particulars of its claim as pleaded against both the first and second defendants (see paras 26, 28 & 30).

(4) The principle that the law forbids the contract breaker/blameable party to use the situation as a means of attack towards the innocent party was of no assistance to the plaintiff as, apart from the court's finding of breach

of contract by the plaintiff themselves and that any of the breaches of contract, fiduciary duties, etc as pleaded had not been proven against either the first or the second defendant, the facts spoke for themselves as to the cause of the FPSO contract being terminated and the performance guarantee being invoked against the second defendant. It was wholly incorrect to suggest that the plaintiff was a blameless party, and that second defendant was a blameable party/contract breaker (see paras 32–33).

(5) In the circumstances, particularly the court's finding on the cause of the termination of the FPSO contract, the second defendant would in principle entitled to be indemnified as counterclaimed in the sum to be assessed by the registrar. The plaintiff's liability to the second defendant under the performance guarantee had clearly been established as no liability against the second defendant as alleged had been proved (see para 36).

[Bahasa Malaysia summary

Melalui satu surat tawaran ('surat tawaran tersebut'), plaintif telah dilantik oleh Ophir Production Sdn Bhd ('OPSB') sebagai kontraktor utama untuk projek pengeluaran, penyimpanan dan pemunggahan terapung yang disewa ('projek FPSO'). Sebagai kontraktor utama, plaintif bertanggungjawab untuk membeli sebuah kapal dan kemudiannya mengubahsuai kapal tersebut menjadi kapal FPSO untuk digunakan di Zon Lapangan Ophir. Untuk tujuan melaksanakan projek tersebut, plaintif dan defendan kedua telah memasuki usaha sama melalui perjanjian konsortium ('perjanjian consortium'). Defendan kedua juga telah menandatangani jaminan prestasi untuk kepentingan plaintif dan OPSB, di mana sekiranya kontrak antara OPSB dan plaintif ditamatkan oleh OPSB; defendan kedua akan mengambil alih kontrak tersebut ('jaminan prestasi'). Defendan pertama dalam kes ini dilantik sebagai pengurus projek untuk mengawasi dan menguruskan projek FPSO tersebut. Sepanjang bermulanya projek FPSO tersebut, terdapat beberapa kelewatan berlaku apabila plaintif masih belum mendapatkan kelulusan kemudahan kewangan dari SME Bank. Kelewatan tersebut menyebabkan plaintif kehabisan modal untuk mendapatkan perkhidmatan bot tunda untuk menunda kapal tersebut ke OPL Johor. Selanjutnya, disebabkan kelewatan dalam proses menunda kapal, OPSB memberhentikan perkhidmatan plaintif sebagai kontraktor utama projek FPSO tersebut ('penamatan tersebut'). OPSB kemudian menguatkuasakan jaminan prestasi yang menyebabkan defendan kedua mengambil alih dan menyelesaikan projek FPSO tersebut. Disebabkan oleh kegagalan plaintif, defendan kedua mengalami kesulitan dan juga terpaksa menanggung perbelanjaan besar untuk menjalankan projek FPSO. Plaintif dalam kes ini memfailkan saman ke atas defendan-defendan kerana melanggar kontrak, pelanggaran tugas fidusiari dan tort mendorong pelanggaran kontrak manakala defendan kedua memfailkan tuntutan balas bagi menuntut ganti

rugi pelanggaran kontrak oleh plaintif yang didakwa menyebabkan penguatkuasaan jaminan prestasi terhadap defendan kedua. A

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan kedua dengan kos sebanyak RM30,000: B

(1) Defendan dengan betul menunjukkan faktor-faktor berikut yang akan menghilangkan anggapan mengenai hubungan fidusiari antara plaintif dan defendan pertama: (a) defendan pertama sebagai pengurus projek, melaporkan kepada Jawatankuasa Pemandu yang terdiri daripada wakil dari kedua-dua plaintif dan defendan kedua; (b) defendan pertama tidak dapat melakukan apa-apa tanpa persetujuan Jawatankuasa Pemandu; dan (c) tidak ada keterangan yang dikemukakan oleh plaintif bahawa mereka rentan dan/atau bertindak atas arahan defendan pertama. Walaupun jika dianggap terdapat hubungan sedemikian antara plaintif dan defendan pertama, tidak dibuktikan bahawa pelanggaran kewajipan fidusiari yang dilakukan olehnya telah menyebabkan OPSB menamatkan surat tawaran tersebut dan tidak ada pemberitahuan berkenaan perihal tersebut yang dikeluarkan kepadanya pada masa yang material (lihat perenggan 14 & 29). C D

(2) Berdasarkan keseluruhan keterangan, tidak dapat dipertikaikan bahawa kontrak tersebut ditamatkan oleh OPSB semata-mata kerana kegagalan plaintif melaksanakan terma dan kewajiban kontraknya, terutama mengenai kegagalannya memperoleh pembiayaan atau kemudahan pinjaman yang diperlukan untuk projek FPSO. Penamatan tersebut bukan disebabkan oleh pelanggaran tugas fidusiari atau kontrak lain oleh defendan-defendan. Setelah penamatan tersebut dibuat, tidak ada pemberitahuan atau surat-menyurat yang dikeluarkan kepada defendan-defendan yang memaklumkan mereka bahawa tindakan atau peninggalan mereka telah menyumbang kepada penamatan kontrak FPSO oleh OPSB yang akan memberi peluang kepada defendan-defendan untuk menjelaskan keadaan tersebut (lihat perenggan 25). E F G

(3) Perjanjian konsortium antara plaintif dan defendan-defendan telah tidak lagi berkuatkuasa dan tidak lagi mengikat defendan-defendan seperti yang dibuktikan oleh surat plaintif sendiri yang bertarikh 22 Mac 2017. Oleh itu, defendan-defendan dalam undang-undang telah dibebaskan dari tanggungjawab kontrak asal mereka di bawah perjanjian konsortium tersebut. Berdasarkan semua alasan di atas, maka plaintif gagal membuktikan atas imbangan kebarangkalian kausa tindakan mereka dan butir-butir tuntutan mereka yang diplidkan terhadap kedua-dua defendan pertama dan kedua (lihat perenggan 26, 28 & 30). H I

(4) Prinsip bahawa undang-undang melarang pihak yang melanggar kontrak/pihak yang dipersalahkan untuk menggunakan situasi sebagai

alat serangan terhadap pihak yang tidak bersalah tidak memberi pertolongan kepada plaintif kerana, selain daripada keputusan mahkamah bahawa pihak yang melanggar kontrak adalah plaintif sendiri dan bahawa apa-apa pelanggaran kontrak, kewajipan fidusiari, dan lain-lain sebagaimana yang diplidkan telah gagal dibuktikan terhadap defendan pertama atau kedua, fakta-fakta kes sendiri telah menunjukkan penyebab kontrak FPSO ditamatkan dan jaminan prestasi dikuatkuasakan terhadap defendan kedua. Adalah sama sekali tidak benar untuk menyatakan bahawa plaintif adalah pihak yang tidak bersalah, dan defendan kedua adalah pihak yang dipersalahkan/pihak yang melanggar kontrak (lihat perenggan 32–33).

(5) Dalam keadaan kes, terutama dapatan mahkamah mengenai penyebab penamatan kontrak FPSO, defendan kedua pada dasarnya berhak untuk ditanggung rugi seperti yang dimohon dalam tuntutan balas dalam jumlah yang akan dinilai oleh pendaftar. Tanggungjawab plaintif terhadap defendan kedua di bawah jaminan prestasi telah jelas dibuktikan memandangkan tidak ada tanggungan terhadap defendan kedua seperti yang didakwa telah dibuktikan (lihat perenggan 36).]

Cases referred to

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302; [1987] CLJ Rep 102, SC (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474; [1991] 1 CLJ Rep 321, SC (refd)

Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor [2014] 1 MLJ 287, CA (refd)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeal [1996] 2 MLJ 265, CA (refd)

Yusfarizal Yusoff (Adam Luqman bin Amdan with him) (Yusfarizal Aziz & Zaid) for the plaintiff.

Danial Rahman bin Yang Razali (Norazali bin Nordin and Intan Surayya bt Abdul Halim with him) (Maxwell Kenion Cowdy & Jones) for the defendants.

Gunalan J:

[1] This is a civil action for breach of contract, breach of fiduciary duties and tort of inducement of breach of contract that proceeded to full trial. The second defendant filed a counterclaim for damages for breach of contract by the plaintiff that allegedly caused the enforcement of the performance guarantee against the former.

BACKGROUND OF THE PLAINTIFF'S CLAIM

[2] The material facts relating to the claim have been summarised in the plaintiff's submission as follows:

> On 11 June 2014, Ophir Production Sdn Bhd ('OPHIR') an oil and gas company, was awarded a contract named 'Small Field Risk Service Contract' (hereinafter referred to as 'the said SFRSC contract') by Petronas. Based on the said SFRSC Contract, OPHIR is responsible for the discovery, development and production of hydrocarbon at the selected zones that were categorized as 'Ophir Field' located at the outer coast of Malaysia Peninsular.
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> In furtherance of the said SFRSC Contract, OPHIR had, somewhere in year 2016, issued a tender known as Provision of Leased Floating Production, Storage and Offloading (FPSO) Facility for Ophir Production Sdn Bhd whereby the successful bidder will be responsible to purchase a vessel and subsequently to fabricate the vessel into FPSO vessel to be used at the Ophir Field Zone (hereinafter referred to as 'the said FPSO project').
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> Subsequent to the above, several companies made a bid to obtain the said projects, including the plaintiff and the second defendant. However, based on several factors, the second defendant had failed in its bidding.
>
> Later, the plaintiff had made a bid to obtain the said project whereby the plaintiff had named the second defendant as its partner that will jointly execute the said projects ('the said bidding').
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> In furtherance of the said Bidding, the plaintiff had offered a joint venture with the second defendant to complete the layout of the execution of the said projects in the event the said Bidding is accepted by OPHIR.
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> Based on the proposed joint venture, the plaintiff as the main contractor will do the technical works related to the said projects meanwhile the second defendant will be assigned as 'Engineering and Design Team' which amongst others will be responsible to prepare the vessel throughout the commencement of the said FPSO project.
>
> Subsequent to the above, an arrangement named Consortium Agreement dated 7 November 2016 ('the said Consortium Agreement') was signed by the parties which had formed a binding agreement between the plaintiff and the second defendant.
>
> On 7 November 2016, OPHIR issued a letter of award (hereinafter shall be referred to as 'the said letter of award') to the plaintiff as the main contractor to execute the said FPSO project. The contract document of the said FPSO project was signed on 13 January 2017 by the plaintiff and OPHIR.
>
> Next, OPHIR had requested the second defendant to execute the said performance guarantee whereby in the event the contract with the plaintiff is terminated; the second defendant will take over the contract. Through the said performance guarantee, the second defendant had given an assurance the if the Contract of the said FPSO project is terminated by OPHIR due to the plaintiff's default, the second defendant will take over the Contract from the plaintiff to maintain the performance and the commencement of the said FPSO project.

The said performance guarantee was then signed by the second defendant on 27 December 2016 for the benefit and interest of OPHIR.

In furtherance of the acceptance of the said FPSO project and based on a request made by the second defendant, the first defendant was appointed as the project manager to supervise and manage the said FPSO project. The first defendant shall also give advice and protect the interest of the plaintiff throughout the commencement of the said FPSO project.

Also, the first defendant had prepared the project execution plan of the said FPSO project (hereinafter shall be referred to as 'the said project execution plan') which had laid down in detail job scopes of each party involved, organization chart, project management and execution plan of the entire project until its completion.

The said project execution plan, amongst others, had detailed out the responsibilities of the second defendant as the consortium partner and the first defendant as the project manager.

Delay of the said FPSO project

Throughout the commencement of the said FPSO project, there were several delays when the plaintiff had still yet to secure the approval of facility from SME Bank. The delay has caused the plaintiff to be running out of capital to obtain towing service to tow the said vessel to OPL Johor.

However, the plaintiff had put all efforts within its capabilities to stick to the timeline given by taking its own initiative, including but not limited, to appointing a qualified subcontractor to provide a tug boat for the purpose of towing the said vessel. The plaintiff had also taken its own initiative to liaise with the SME bank in order to get the status of the plaintiff's application. All of these has been done by the plaintiff without the help from the first defendant; the project manager.

The plaintiff had also proposed to change the location of shipyard from OPL Johor to Batam. This would solve the plaintiff's problem since the shipyard in Batam accepted payment by credit and the distance is much shorter than to OPL Johor.

However, the said proposal was rejected by the first defendant and was not presented to OPHIR. OPHIR had issued a reminder letter dated 25 January 2017 and another reminder letter dated 26 January 2017 whereby OPHIR had expressed their concern about the delay in the towing process of the said vessel. OPHIR had then issued a notice to terminate the contract dated 16 February 2017.

Following the issuance of the said notices, the plaintiff had, through several attempts, taken its own initiative to explain to OPHIR the causes/factors that led to the delay and had made several requests to OPHIR, to review the initial timeline of the project. These have also been done without any assistance and/or support from the first defendant as the project manager and the second defendant as the consortium partner.

Termination of the said FPSO project by OPHIR

Even though the plaintiff had made so much effort to comply with the contract, OPHIR finally terminated the plaintiff's service as the main contractor of the said FPSO project ('the said termination') via termination letter dated 24 February 2017, reason being that the plaintiff had failed to rectify the breach.

THE PLAINTIFF'S CAUSES OF ACTION

[3] The cause of action against the second defendant is for breach of contract, breach of fiduciary duty and the tort of inducement of breach of contract, particulars of which are that:

(a) the second defendant had breached its duty under the consortium agreement;

(b) the second defendant had breached its fiduciary duty as consortium partner when the company disregarded its duty not to act to the detriment of the plaintiff; and

(c) the second defendant also had committed tort of inducement for breach of contract when the company had inference with the relationship between the plaintiff and OPHIR.

[4] The cause of action against the first defendant is for breach of fiduciary duty and the tort of inducement of breach of contract in that:

(a) the first defendant had breached his fiduciary duty as a project manager for the said project when he had acted not for the benefit of the plaintiff but only for his company; and

(b) the first defendant had also committed the said tort of inducement when he misused his position as project manager to interfere with and/or sabotage, the plaintiff's work.

SUMMARY OF THE DEFENDANTS' CASE

(a) Ophir Production Sdn Bhd ('OPSB') tendered for the project of Leased Floating Production, Storage and Offloading ('FPSO');

(b) the plaintiff offered a collaboration between the plaintiff and the second defendant with regard to the plaintiff's bid in the FPSO project whereby the defendants had prepared the documentation with regard to the technical works in order for the plaintiff's bid to succeed;

(c) through a letter of award dated 7 November 2016, the defendants state that the plaintiff was awarded the FPSO project which was subject to the following conditions to be fulfilled by the plaintiff, among others, namely:

    (i) to provide a vessel booking form or equivalent to OPSB within 14 days from the date of the offer letter;

    (ii) to provide an executed copy of an unconditional letter of offer for loan facilities to OPSB to support the due performance of the contract within 45 days from the date of the letter of award;

(iii) to provide a draft copy of the consortium agreement to OPSB within 14 days from the date of the letter of award; and

(iv) to provide a bank guarantee of USD3m to OPSB within 30 days from the date of the letter of award.

(d) after being awarded with the FPSO project, the plaintiff through a letter of award also dated 7 November 2016, awarded a contract to the second defendant for three categories of work only, namely, 'provision of supply and delivery of tanker, provision of front and engineering design ('FEED'), detailed design engineering ('DDE') and project management team ('PMT'), and the provision of supply and delivery of flowline for the FPSO project' ('the said TRENS letter of award');

(e) meanwhile, the plaintiff via the supplementary letter No 1 dated 2 December 2016 had cancelled the scope of work 'provision of supply and delivery of flowline' ('the said supplementary letter No 1');

(f) therefore, the defendants state that at all material times, the responsibility to obtain funds from any banks for the purpose of carrying out the FPSO project lies with the plaintiff;

(g) regarding the said TRENS letter of award, the defendants further state that the plaintiff also requested the second defendant to provide a draft of the consortium agreement;

(h) therefore, on 7 November 2016, the consortium agreement was not in existence whereupon the request by the plaintiff for fulfilling its obligation to OPSB was prepared, agreed and signed by the plaintiff and the second defendant after the date of 7 November 2016;

(i) upon signing of the consortium agreement, the plaintiff and second defendant had a subsequent discussion pertaining to the formation of a new entity known as 'Tres-MTCE Consortium' for the purpose of the FPSO project;

(j) both parties could not agree on the contribution of the funds and/or the equity for the new entity. Thus, the implementation of the terms of the consortium agreement was left hanging and at all material times, there is no obligation to assist and rectify as pleaded by the plaintiff;

(k) even if the obligation exists, it is not applicable and/or does not bind the second defendant or the first defendant since the actions and the agreement of the plaintiff after the date of the consortium agreement;

(l) on 23 November 2016 and 23 December 2016, both parties had discussions regarding the responsibility matrix for the purpose of implementation of the FPSO project;

(m) as a result of the discussions, the plaintiff would have to be responsible to obtain funds from any banks for the purpose of carrying out the FPSO project and would also be fully responsible for the operational cost of the Towing Tug from Makassar to OPL at Johor;

(n) subsequently, as the plaintiff was unable to provide a bank guarantee to OPSB, the second defendant had signed a performance guarantee dated 27 December 2016 to OPSB for the benefit of the plaintiff;

(o) in return, the plaintiff gave a letter of undertaking dated 27 December 2016 giving an undertaking to indemnify the second defendant for any losses and damages resulting from the plaintiff's failure to perform the FPSO contract;

(p) the FPSO project was postponed several times due to the plaintiff's failure to obtain funds and not having enough funds to pay the service charges for the purpose of towing the tanker to the OPL in Johor;

(q) subsequent to that, OPSB issued several letters of reminder expressing their concerns towards the delay of the towing process;

(r) since the plaintiff failed to tow the tanker within the prescribed time, OPSB land terminated the plaintiff's service as the main contractor through a letter of termination dated 24 February 2017;

(s) OPSB then enforced the performance guarantee which was signed by the second defendant which caused the latter to take over and complete the FPSO project; and

(t) due to the plaintiff's failure, the second defendant had suffered difficulties and had also to bear huge expenses to run the FPSO project. The details of the losses of the second defendant are as pleaded in the paras 20–25 of the counterclaim.

ISSUES FOR DETERMINATION

(a) whether the first defendant; as project manager for the said FPSO Ledang Project has fiduciary duties towards the plaintiff. If the answer is in the affirmative:

  (i) whether the first defendant had breached the terms of the appointment and/or had failed to perform his fiduciary duties as project manager? and

  (ii) whether the conduct of the first defendant tantamounts to an 'inducement of breach of contract'?

(b) whether terms of the said consortium agreement are *enforceable* and *binding* upon the first defendant and/or the second defendant based on

A conduct of the parties and the agreement with the plaintiff after the date of the said consortium agreement?

(c) If the answer in para (b) is in the affirmative:

B (i) whether the second defendant; as consortium partner to the plaintiff, has 'common duties', 'duty to assist and to rectify' and 'fiduciary duties' towards the plaintiff based on the consortium agreement?

C (ii) whether the second defendant has failed to perform the 'common duties', 'duty to assist and to rectify' and 'fiduciary duties' towards the plaintiffs?

D (iii) if the answer in para 3.2 is in the affirmative; whether the failure on the part of the second defendant in para 3.2 above tantamounts to 'unconscionable conduct'? and

(iv) whether the second defendant had breached the said consortium agreement?

E (d) whether the conduct of the defendants is tantamounts to tortious liability under the 'tort of interference' by the defendants;

(e) whether the plaintiff is entitled to prayers (a) until (g) in para 31 of the statement of claim; and

F (f) whether the defendants are entitled to their claim as per prayer (a) until prayer (e) in para 25 of the counterclaim.

FINDINGS

G **[5]** This court, having read the pleadings and submissions of the plaintiff ('P'), first and second defendants ('D1' and 'D2') and considered the entire evidence of the parties adduced at the trial as a whole, the issues for determination, the relevant principles of law applicable and the respective contentions advanced by counsel, finds as follows on P's claim and D2's counterclaim ('C/C').

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[6] Primarily, what has to be borne in mind is the principle that the burden of proof in a civil claim lies throughout on the plaintiff. No onus lies on the defendant to disprove any of the pleaded allegations unless sufficient evidence to support the allegations has been produced by the plaintiff and the said I evidence is credible.

[7] In this case, P has pleaded at length several breaches of duties, fiduciary and others, by D1 as the project manager appointed by both contracting parties and by D2 in its role as a joint venture partner in regard to duties owed

to P. It was alleged that the said breaches purportedly caused P to be unable to perform the main contract with OPSB project for the FPSO project which led the contract to being terminated, thereby causing losses to P.

[8] Foremost among the pertinent considerations arising from the evidence in this case is that, at all material times, the plaintiff did not dispute that they failed to perform the contract with OPSB which led to the termination of their services. OPSB had terminated the plaintiff's services as the contractor for the FPSO project through a letter of termination dated 24 February 2017 which was not disputed.

[9] As correctly highlighted by the defendants, after their termination, the plaintiff did not issue any notice or correspondence to the defendants in respect of the latter's purported conduct or omission that contributed to the said termination by OPSB. It is noteworthy that the notices of demand issued by the plaintiff's solicitors were at the earliest dated 15 June 2017 followed by another notice of demand dated 14 May 2018. However, it is only through the present proceedings that the plaintiff is contending that the defendants have contributed to or caused its failure to perform the contract.

[10] In the case of D1, of primary consideration is the issue whether D1 owed any fiduciary duties to the plaintiff. This in turn depends on whether at the material time there existed a fiduciary relationship between the plaintiff and D1. In this regard, it is vital to examine the role and functions of D1 as the project manager of the FPSO project.

[11] The defendants' position was that there was no fiduciary duty between D1 and plaintiff as the former, at all material times, was only the project manager with a specific job scope. Reference was made to the evidence of PW1 himself who testified that the project manager ('D1'), 'shall have the entire responsibility to execute the said FPSO Ledang Project to create a work safe environment, to make sure the work done is based on prescribed quality and based on prediction and schedule that is in accordance with terms and conditions of the contract. The project manager also shall report to steering committee on the development of the said FPSO Ledang Project, safety performance, quality, etc.

[12] The plaintiff on the other hand stressed that the law is extremely clear on the fiduciary relationship that exists between JV/consortium partners by relying on the Supreme Court case of *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474; [1991] 1 CLJ Rep 321:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales*

(Finance) Pty Ltd [1974] 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint venturers have fiduciary relations, inter se would seem to be essential for the efficacy of the device.

In the High Court of Australia case of *Jenyns v Public Curator (Q)* 90 CLR [1953–54] 113 Dixon CJ, McTiernan and Kitto JJ have this to say at p 133:

> We are not here dealing with any of the traditional relations of influence or confidence — solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Another v The Equity Trustees, Executors and Agency Company Ltd and Anor* 42 CLKR 384, Dixon J at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:

> The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v Smith* [1890] 15 App Cas 223 at p 225; [1886] 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v Stewart* [1881] 6 App Cas at p 79). The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm. Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties. (Emphasis is mine.)
>
> ...

We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one.

[13] In support of their contention, the defendants relied on another leading authority on this subject, *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeal* [1996] 2 MLJ 265 pp 299–300

where the Court of Appeal held the following to be indicative of the existence of a fiduciary relationship:

(a) the existence of a relationship of confidence, which may be abused;

(b) inequality of bargaining power; and

(c) instances of vulnerability.

[14] In my considered view, the defendants correctly highlighted the following factors that would go to dispel any notion of a fiduciary relationship between the plaintiff and D1:

(a) D1, as the project manager, reports to the steering committee which comprises of representatives from *both* plaintiff and the *second defendant*;

(b) D1 has no bargaining power vis a vis the plaintiff in respect of the consortium agreement of the FPSO Ledang contract; that is, D1 cannot do anything without the approval of the steering committee; and

(c) there is no evidence led by the plaintiff that they are vulnerable and/or at the mercy of D1.

[15] On the basis that the purported fiduciary relationship did exist, the question that arises is whether the several allegations of breach of fiduciary duties have been proved against D1. It was basically alleged that D1 as the appointed PM did not protect the interests of the plaintiff despite having full knowledge of the financial constraints faced by the plaintiff and in fact acted to its detriment leading to the termination of the FPSO contract. However, as highlighted by the defendants, the plaintiff is the lead institution (as per the consortium agreement dated 7 November 2017) and the letter by OPSB about the delays in the towing process were addressed to the plaintiff and specifically directed to PW1. The said letters were carbon copied to D1 as the CEO of D2. The plaintiff or its representative did not reply to the said letters which was confirmed by the plaintiff's solicitors in the course of PW1's cross examination. Further, there was no evidence led that PW1 or any other representative from the plaintiff had instructed D1 to reply to the said letters.

[16] As the plaintiff themselves did not respond to the important letters directly addressed to them, they cannot now belatedly shift the blame to the defendants for the consequences that followed. It was not shown at all that it was the act or omission of D1 in his role as the PM that resulted in the FPSO contract being terminated.

[17] The plaintiff also sought to implicate the defendants by reference to the letter dated 7 February 2017 wherein D1 in the capacity as CEO of D2 had written:

A ... Kindly be informed that in the spirit of the contract and as guarantor, we are committed in ensuring the contract is performed in due and timely manner. Since times is of the essence of the contract, we are willing and prepared to do the necessary steps to avoid further delay ...

B **[18]** I agree with the defence contention that there can be nothing sinister or malicious in respect of the said letter. It is only D2, as 'performance guarantor' informing OPSB that the former is committed to ensuring that the contract is performed in a due and timely manner and sought further instructions from OPSB as to further conduct of the towing exercise. In its reply, OPSB asked the C plaintiff for a reply and not from D1 or D2. In any case, OPSB did not terminate the contract based on this letter and there was no evidence at all to this effect.

D **[19]** It was also alleged against D1 that he had purportedly failed to take reasonable steps to discuss and/or negotiate with OPSB regarding the rigid milestone. It was alleged that as a PM, D1 was in a position to discuss and convince OPSB to review the rigid timeline to become more flexible without affecting the commencement of the project. However, no effort was made E and/or action whatsoever was allegedly taken by D1 for that purpose. Suffice to say that this allegation was proven baseless by the plaintiff's own evidence as it was the plaintiff themselves who determined the project schedule as unequivocally admitted by PW1 himself. The purported rigidity of the schedule was clearly not the reason that the plaintiff could not perform its F obligations under the contract. The actual reason was none other than its inability to secure financing for the project which in turn caused the delay and ultimately the termination by OPSB.

[20] As against D2, they were said to have been acting together with D1 G against the interests of the plaintiff. It was alleged that when the said FPSO project was taken over by D2, D1 had negotiated with OPSB for the purpose of reviewing the milestone which, apparently, was approved by OPSB. This allegation too appears to be without basis as the evidence disclosed without doubt that the project had already been delayed on several occasions H entirely due to the plaintiff having failed to secure financing which prevented the plaintiff from securing the services of the tug boats to tow the vessel to the Johor Port as required which was again admitted by PW1 himself.

[21] Likewise, the allegation that D1 had failed to give proper and I reasonable advice as to the use of only one tug boat instead of two tug boats to tow the vessel to the Johor port compared to the advice that he had given to D2 when the latter took over the project, can be rejected as an afterthought for not having been raised prior to this suit. Importantly, it was the plaintiff themselves who had prepared the project schedule and no evidence was led that the usage

of two tug boats was unnecessary and would raise costs. It must be reiterated that the plaintiff was disabled from performing the contract and complying with the agreed schedule due to its inability to secure the necessary funding on time.

[22] Moving on to the next crucial issue as to whether D1's conduct amounted to an inducement of breach of contract, the plaintiff in gist contended that D1 had purportedly ignored his duty to act as the PM for the benefit of the plaintiff and/or the said consortium. Purportedly, D1 had acted with a clear intention or motive to encourage the plaintiff to breach the said FPSO project because he had the knowledge that D2 will take over the project once the plaintiff is terminated. The short answer to this question would be that the evidence disclosed that, at all material times, the plaintiff was unable to secure the necessary financing or funds to carry out the project and the sole reason why the plaintiff's services as contractor were terminated was because it failed to ensure that the tanker/vessel arrived at OPL Johor port on the 24 February 2017.

[23] Of importance in connection with the issue at hand is the fact that it is only via this action that the plaintiff is alleging that the defendants contributed to the plaintiff's failure to perform the contract with OPSB. At all material times, throughout their dealings with the defendants prior to this suit, the plaintiff did not dispute that they were unable to perform the contract due to lack of funds which led to the contract being terminated. Equally important is that no evidence was led by the plaintiff to show that if the same steps and/or efforts which D1 purportedly did not do or had omitted to do, were done, OPSB would not have terminated the plaintiff's services as contractor.

[24] A summary of the elements that must be fulfilled for a claim for the tort of 'inducement of breach of contract' to succeed can be found in the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 where it was remarked:

> ... learned counsel for the appellant referred us to *Greig v Insole* [1978] 1 WLR 302, a passage in which, he submits summarises the law regarding the tort of inducement to breach of contract.
>
> At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:
>
> > First, there must be (a) 'direct' interference'; or (b) 'indirect' interference coupled with the use of unlawful means; see per Lord Denning MR in *Torquay Hotel Company Ltd v Cousins* [1969] 2 Ch 106 at p 138.
> >
> > As to the meaning of 'interference' this is not confined to the actual procurement or inducement of a breach of contract: it can cover a case where the third person

prevents or hinders one party from performing his duties even though this be not a breach.

Secondly, the defendant must be shown to have knowledge of the relevant contract.

Thirdly, he must be shown to have had the intent to interfere with it.

Fourthly, in bringing an action, other than a quia timet action the plaintiff must show that he has suffered special damage, that is more than nominal damage; see *Rookes v Barnard* [1964] AC 1129 at p 1212, per Lord Devlin.

In any quia timet action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful; *Emerald Construction Company Limited v Lowthian* [1966] 1 WLR 691 at p 703, per Diplock LJ.

Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

[25] Based on the overall evidence before the court, it is indisputable that the contract awarded to P by Ophir Production Sdn Bhd ('OPSB') via the letter of award dated 7 November 2016 was terminated by OPSB solely due to the failure of P to perform its contractual terms and obligations, particularly in regard to its failure to obtain the necessary funding or loan facilities for the FPSO project. It was not due to any breaches of fiduciary or other contractual duties by D1 or D2. Following the termination, no notice or correspondence was issued to D1 or D2 notifying them that their purported acts or omissions had contributed to the termination of the FPSO contract by OPSB that would have provided the defendants an opportunity to explain the situation.

[26] Furthermore, the consortium agreement ('CA') between the plaintiff and the defendants had ceased to exist and was no longer binding on the defendants as evidenced by the former's own letter dated 22 March 2017. Upon subsequent discussion between the parties, after the terms of the CA could not be carried out, the parties came to an agreement on the future distribution of responsibilities or responsibility matrix. It would appear that, thereafter, D2 had performed its part of the agreement but the plaintiff failed to do so which caused OPSB to invoke the performance guarantee against D2.

[27] The agreement reached differed from the terms as to division of responsibilities under the CA. In essence, the result of the said meetings between the parties was that the plaintiff and D2 agreed that the plaintiff will be responsible for the operational cost of the 'towing tug' from Makassar to Johor OPL port as opposed to 'common duty' under the CA. In any event, in their letter dated 22 March 2017 the plaintiffs themselves stated unreservedly that the CA was no longer valid and effective following the meeting on 7 December 2017.

[28] There was, thus, undoubtedly, a clear variation of the original terms and conditions of the CA which, in any case, were never carried out. Hence, the defendants were in law discharged from their original contractual obligations under the CA. A case squarely in point is *Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor* [2014] 1 MLJ 287 where the Court of Appeal pronounced that:

> [46] By virtue of s 63 of the Contracts Act 1950, the second respondent had been discharged from any contractual obligation under the original appointment. In its original text, s 63 of the Contract Act 1950 enacts as follows:
>
> 63 Effect of novation, rescission and alteration of contract.
>
> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
>
> [47] ...
>
> [48] ...
>
> [49] Low Hop Bing J (later JCA) in *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1996] MLJU 359 at pp 9–10; [1997] 1 CLJ Supp 448, at p 454 had this to say about 'novation':
>
> Pollock & Mulla, *Indian Contract and Specific Relief Acts* (10th Ed) at p 501 sets out the requirements that must be satisfied before a party can successfully show that a contract has been varied pursuant to s 63, viz:
>
> (a) firstly, the variation of the contract may be shown by express agreement; and
>
> (b) secondly, if variation is to come about a course of conduct, the variation was intended and understood by both parties.

[29] Assuming that D1 could be considered to be in a fiduciary relationship with P as the project manager under the JVA between P and D2, it was not proved that the purported breach of fiduciary duties by him had caused OPSB to terminate the LOA to P nor was any notice of the same issued to him at the material time.

[30] P had, therefore, based, inter alia, on the above reasons, failed to prove on a balance of probabilities its cause of action and particulars of its claim as pleaded against both D1 and D2. Hence, P's claim has to be dismissed with costs.

D2'S COUNTERCLAIM

[31] It is essentially premised on the enforcement of the performance guarantee ('PG') against D2 by OPSB flowing from P's failure to perform the contract as stipulated in OPSB's LOA and the undertaking given by P to

indemnify D2 against any losses, damages, etc. caused by, amongst others, P's failure or non-performance of the contract. P's failure or non-performance of the contract is clearly supported by the indisputed evidence in this case which has been adverted to.

[32] In opposing D2's counterclaim, the plaintiff, inter alia, contended the law forbids the contract breaker/blameable party to use the situation as a means of attack towards the innocent party and invoked the well-established principle explained by the Supreme Court in the case of *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] CLJ Rep 102 as follows:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *NewZealand Shipping Company Ltd v SDAECD France* [1919] AC 1.
>
> (See also *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)* [2011] 4 MLJ 173; [2011] 3 CLJ 16).

[33] In my considered view, this principle is of no assistance to the plaintiff as, apart from my finding of breach of contract by the plaintiff themselves and that any of the breaches of contract, fiduciary duties, etc as pleaded had not been proven against either D1 or D2, the facts spoke for themselves as to the cause of the FPSO contract being terminated and the PG being invoked against D2. It was wholly incorrect to suggest that the plaintiff was a blameless party and that D2 was a blameable party/contract breaker.

[34] To recapitulate the events, as at *21 December 2016*, the plaintiff was still unable to fulfill all the terms and condition of the letter of award wherein it had yet to provide OPSB with the letter of offer for loan facilities ('LOO') and financing plan as evidenced by OPSB's letter dated 21 December 2016. OPSB then extended the period for plaintiff to obtain the LOO to 31 January 2017, whilst waiving the term/condition for a consortium agreement on condition that D2 executes a PG in favour of OPSB. As the plaintiff was unable to provide the LOO and financing plan to OPSB, D2 provided the PG dated 27 December 2016 to OPSB. In consideration thereof, the plaintiff provided a letter of undertaking dated 27 December 2016 to D2. Amongst others, the plaintiff gave an undertaking in the following manner, '... (4) TESB hereby agree to indemnify and hold MTCE harmless from and against any losses, damages and causes of action arising out of or in connection with any failure or non-performance by TESB of the contract'.

[35] Ultimately, in spite of the extension of time granted, the plaintiff could not perform and execute the FPSO project due solely to its failure to procure the required financing. As a result, OPSB had terminated the plaintiff's services as the contractor for the FPSO project through a letter of termination dated 24 February 2017. Due to the plaintiff's failure to perform the contract as stipulated in the 'letter of award', OPSB then enforced the PG on D2 who was then compelled to take over the FPSO project and bear the whole cost of the project. Hence, there was no question at all of D2 not having incurred any loss or damage as a consequence of the default by the plaintiff which has been amply established in this instance.

[36] Hence, in the circumstances, particularly as my finding on the cause of the termination of the FPSO contract, D2 would in principle entitled to be indemnified as counterclaimed in the sum to be assessed by the Registrar. The plaintiff's liability to D2 under the PG has clearly been established as no liability against D2 as alleged had been proved.

[37] Judgment to D2 on the counterclaim with damages to be assessed as above.

[38] Costs of RM30,000 to defendants subject to allocatur.

Plaintiff's claim dismissed with costs; second defendant's counterclaim allowed with costs of RM30,000.

Reported by Dzulqarnain bin Ab Fatar